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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT PADILLA'S BRIEF IN OPPOSITION

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INTRODUCTION

Metro-North's petition for a writ of certiorari ("Petition") has been written as if no jury had ever found facts supporting the verdict and as if the Second Circuit had written its opinion far differently from the way it has been officially reported (A1-20).

We deal here first with the manner in which Metro-North has erroneously viewed the facts and then with the manner in which it claims the Second Circuit ruled.

STATEMENT OF THE CASE

Metro-North's recitation of the facts is merely its own version of what happened—a version clearly rejected by the jury. It erroneously refers to its own trial evidence as if it were factual and undisputed by Padilla and it describes Padilla's evidence as "vague and self-serving" (Petition 19).

Lost among what amounts to a defense summation disguised as an objective "statement of the case" are the following items of evidence which the jury was entitled to believe and which, as the Second Circuit properly held, supported the jury's verdict of willful retaliation:

1. In mid-1987, Padilla was Metro-North's Superintendent of Train Operations; his immediate supervisor was General Superintendent Edmund Boni, whose immediate superior was Vice President of Operations Donald Nelson (A3);

2. Padilla's periodic evaluation reports, prepared by Boni and approved by Nelson, were uniformly glowing (A4);

3. In mid-1987, one Michael Barletta, age 61, was an Assistant Chief Train Dispatcher supervised by Padilla; Boni believed that Barletta was too "old" and forced Padilla to "disqualify" him, i.e., to transfer him to another position, without the contractually-required hearing (A4);

4. Barletta filed an age discrimination claim with Metro-North's in-house affirmative action department; just before the investigator was to issue a report finding that Boni had discriminated against Barletta by virtue of the latter's age, Boni suppressed the report (Stipulation at Trial Transcript 221-22);

5. In October of 1987, Padilla told Nelson that he believed that the disqualification of Barletta had been wrong and that Boni had claimed that Barletta was "too old" (A4);

6. In January of 1988, Barletta filed an age discrimination complaint with the EEOC; Nelson was aware of the filing of the complaint before May (Trial Transcript - 595);

7. On April 6, 1988, Padilla told Nelson that he was about to give a statement to the EEOC on the Barletta matter (A5);

8. On April 7, 1988, Padilla gave a statement to the EEOC in which he asserted that Boni had made disparaging remarks about the age of Barletta and other Metro-North employees; because he feared retaliation and in an effort to save his job, Padilla falsely asserted that he did not believe that Boni ordered Barletta's disqualification because of the latter's age (A5);

9. In early April of 1988, Boni called Padilla "disloyal" and said that he would "get him" through his subordinate, one Marijanke Badurina, if he did not "stop cooperating with them guys downtown"—an apparent reference to the EEOC (A5-6);

10. On April 11, 1988 Badurina, who was conducting audits of various Metro-North departments, then began auditing the department Padilla ran; although when conducting audits of other departments she had conferred with their heads and had allowed them to suggest corrections of perceived problems, she did not follow that same procedure with respect to Padilla's department (A6);

11. Before May 4, 1988, Boni and Badurina advised Nelson that there was "mismanagement" in Padilla's department (A6);

12. On May 4, 1988, Nelson met with Padilla, Boni and others about the so-called "mismanagement"; at the end of the meeting, Nelson suspended Padilla pending further investigation into the so-called "mismanagement" (A6-7);

13. On May 9, 1988, Padilla filed a claim with the EEOC alleging that his suspension constituted an act of retaliation against him for having cooperated with it against Metro-North

in the Barletta matter; Nelson learned of this filing on the very next day (A7);

14. On May 13, 1988, Nelson received a report of the results of the "investigation" into Padilla's so-called "mismanagement" of his department—a report which confirmed that "mismanagement"; (A7)

15. On June 10, 1988, Nelson officially demoted Padilla, advising him to exercise his rights under his union contract and to accept a position at Metro-North paying $20,000 less than his current position; Padilla followed that advice (A7-8);

16. Although Badurina's audits of other departments disclosed "mismanagement" costing Metro-North millions of dollars, no head of any such department was disciplined by Nelson in any way; the "mismanagement" in Padilla's department cost only thousands of dollars, yet Padilla was demoted; the heads of those other departments had not been involved in the EEOC investigation into the Barletta age discrimination complaint (A13).

As a result of this testimony and its review of the entire record, the Second Circuit properly held (A13) that "there was sufficient evidence to support the jury's conclusion that Padilla's demotion was for purposes of retaliation."

REASONS FOR DENYING THE WRIT

Metro-North's reasons for granting the writ are based upon its misunderstanding of the record, of the opinions of the courts below and of the traditional purpose of the writ it seeks.

I. THE SECOND CIRCUIT NEITHER ANNOUNCED NOR APPLIED A *PER SE* STANDARD OF LIABILITY

Metro-North claims (Petition 13-10) that the Second Circuit announced and applied a *per se* standard of liability when

affirming the jury's verdict on the retaliation issue. Its claim is erroneous.

First, a mere reading of the Second Circuit's opinion on the liability issue (A11-13) demonstrates that it *announced* no such standard.

Nor did the Second Circuit *apply* a *per se* standard, Metro-North's argument to the contrary being based largely upon its quibble with the weight of the evidence of retaliation—a weight to be measured solely by the jury.

We list here, in no particular order, some of the legal and factual errors which Metro-North has included in its misguided argument on this point.

1. It claims (Petition 14) that the Second Circuit relieved Padilla of proving Nelson's discriminatory intent and his knowledge of Padilla's protected activity. The court did no such thing, since direct evidence by Padilla showed Nelson's knowledge that Padilla was giving a statement to the EEOC in the Barletta age discrimination matter and circumstantial evidence proved Nelson's retaliatory intent.

2. The claim (Petition 13) that the Second Circuit "transformed" a "pretext" case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) into a "*mixed motive*" case under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) is absurd. Metro-North never challenged the District Court's proper charge on this issue,[1] and the jury, having been submitted the case under the "pretext" theory, must be assumed to have obeyed that proper charge. Moreover, the Second Circuit never even cited *Price Waterhouse*, making it disingenuous to assert that the court below relied upon that case, especially since, when presented with this assertion in Metro-North's petition for rehearing, the court in effect disposed of the

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[1] The District Court charged the jury (Trial Transcript 728) that it could not find for Padilla unless "you . . . disbelieve the explanation given by Mr. Nelson for the demotion of Mr. Padilla . . . ."

assertion by denying the petition (A45).[2] Finally, although Metro-North asserts (Petition 13) that "the Second Circuit did not discuss or apply a pretext analysis with respect to Nelson's decisions to suspend and then to demote Padilla," the assertion is refuted by these words in the opinion (A12):

> Although Nelson asserted that Padilla was demoted because he had become "withdrawn" and because of his mismanagement of the OCC, the jury could have found that Metro-North demoted him because of his participation in the EEOC's investigation of Barletta's charge.

These words, and those that follow (A12-13) shriek "pretext."

3. Metro-North claims (Petition 19), with a disregard of the record which can been seen throughout its "statement of the case", that there was insufficient evidence of Nelson's knowledge that Padilla was engaging in "protected activity." The record shows that on April 6, 1988, Padilla *told* Nelson that he was about to give a statement to the EEOC about the Barletta complaint. We do not know what more proof than that is necessary to constitute "sufficient" evidence of Nelson's knowledge.

4. Metro-North seeks (Petition 17-20) to persuade this Court that the Second Circuit applied some novel rule to the effect that a decision maker is saddled with "constructive knowledge" of the illegal animus of a subordinate toward the victim of discrimination. It did no such thing. The Court below never said that Nelson did not intend to retaliate against Padilla and that he should be held to have intended "constructively" to do so because of the retaliatory intent of his subordinate Boni. It held, instead, that the circumstantial evidence was sufficient to show that Nelson himself had that retaliatory intent.

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[2] Thereafter, the Second Circuit denied Metro-North's motion for a stay of the execution of judgment pending the filing and determination of this Petition.

5. Despite Metro-North's contention (Petition 11-12) that the Second Circuit concentrated on "mixed motive" rather than a "pretext", it is clear that it made the following finding with respect to this trial record:

> [A] reasonable jury could have found that Metro-North demoted Padilla because of his participation in the EEOC'S investigation of Barletta's age discrimination charge.

The evidence we have listed above supports that conclusion. Not even harmless error was committed here, much less one deserving this Court's attention.

Recognizing, perhaps, that a petition for a writ of certiorari is enhanced by a showing of a conflict between or among the Circuits on the issues involved, Metro-North claims that the Second Circuit opinion below conflicts with the rulings of other Courts of Appeal on a variety of issues. The claim is mere wishful thinking and is no more than the creation of straw men, misinterpreting the Second Circuit's rulings and then citing cases from other courts ostensibly in conflict. We set forth here some of the many examples of this spurious argument.

1. Erroneously asserting (Petition 14) that the Second Circuit imputed to Nelson the statements and conduct of Boni and Badurina, Metro-North claims that some six other cases, with "almost identical fact situations," hold that the employer was entitled to judgment as a matter of law. Those cases do not, however, involve "almost identical fact situations," Thus:

a. *Wilson v. Stroh Companies, Inc.*, 952 F2d 942 (6th Cir. 1992), a racial discrimination case, involved the firing of Wilson for eight acts of insubordination found by an impartial arbitrator, the firing being recommended by a supervisor concededly not infected by racism and carried out by a general manager likewise uninfected by discriminatory motive; the District Court's grant of summary judmgnent was affirmed.

b. In *Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996), a racial discrimination case, there was no proof at all that Lattimore's racially-biased supervisor participated in any way in the decision to terminate his employment—a decision made solely because he refused to return to work when an impartial medical examination resulted in a finding that he was able to do so.

c. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995), a case dealing with age and sex discrimination as well as retaliation, involved an employee's claim that she had been fired because she had made complaints of age and sex discrimination against her employer; a grant of summary judgment in favor of the employer was affirmed by the Fifth Circuit since it was shown that her poor performance caused her firing and her biased supervisor had no input into the decision to fire her.

d. *Williams v. Williams Electronics, Inc.*, 856 F.2d 920 (7th Cir. 1988), a racial discrimination case, involved the layoff of an employee, pursuant to a reduction in force, who asserted that racially-biased supervisors and co-employees had caused the layoff; a grant of summary judgment in favor of the employer was affirmed by the Seventh Circuit since none of the racially-biased persons had anything to do with the layoff decision which the undisputed proof demonstrated was honestly based upon performance-related considerations.

e. *Mauter v. Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987), an age discrimination case, involved the affirmance of a grant of summary judgment to an employer when it was shown that the age-biased supervisor played no role whatsoever in the termination decision—a decision based upon economic factors unrelated to age.

f. *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984), an age discrimination case, involved the affirmance of a judgment n.o.v. in favor of an employer on grounds similar to those underlying *Ray*,

Williams and *Mauter*—those harboring the bias had no input into the decision to discharge LaMontagne.

None of these cases is similar to this one and thus none is in conflict with it. Here, the decision maker, Nelson, had actual knowledge of Padilla's cooperation with the EEOC and ostensibly demoted him on what the jury was entitled to find was a pretext.

2. In erroneously asserting (Petition 17-19) that the Second Circuit applied a "constructive knowledge" test in order to find the evidence of retaliation sufficient, Metro-North usurps the jury's function of weighing the evidence and then, of course, finds that the evidence—that Nelson himself knew of Padilla's protected activity when he suspended him in early May—was "ambiguous,[3] self serving," and "far too speculative". It finds the Second Circuit's ruling on this portion of the proof to be in conflict with other cases, none of which is similar to this case and thus none of which is in conflict. Thus, for example:

a. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996), a retaliation case, involved an employee's claim that she was terminated because she made a report of sexual harassment; a grant of summary judgment in favor of the employer was affirmed by the First Circuit on the ground that the employer's intent that she soon be fired was set forth in a company document predating her report.

b. *Jackson v. Delta Special School Dist. No. 2.*, 86 F.3d 1489 (8th Cir. 1996), a sexual discrimination and retaliation case, involved a school principal who, when a higher post she desired was given to one Ronald Smead, began a mostly-conceded year-long campaign of vilification against him, falsely describing him as a drug-dealing womanizer with drinking and financial problems; when discharged because of this and

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[3] We find it difficult to believe as—Metro-North surely believes (Petition 18)—that to describe a man as "too old and too slow and making mistakes" is to make "an ambiguous comment at best."

other misconduct, she brought an action claiming her firing was in retaliation for her earlier filing of a sexual discrimination claim; judgment n.o.v. in favor of the employer was affirmed by the Eighth Circuit on the ground that, in light of her conceded misconduct toward Smead, no rational jury could have found that the reason for her firing lay elsewhere.

c. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989), a retaliation case, involved a sales representative demoted (without loss of pay) because of the inappropriate way he treated subordinates and customers—with profanity, verbal abuse and even physical intimidation over a long period of time; Booker claimed that his demotion was in retaliation for a letter he sent to his employer's Human Resources Department in which "he attacked and attempted to blame all of his problems on his supervisors"; a grant of summary judgment in the employer's favor was affirmed by the Sixth Circuit on the ground that that letter was not the type of charge or complaint which could invoke the protection of the appropriate statute.

d. *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir 1979), *aff'd*, 452 U.S. 161 (1981), a sex discrimination and retaliation case, involved four out of six jail matrons whose positions were terminated after the four sued the County demanding pay equal to that of male guards and who claimed that their termination was in retaliation for their lawsuit; the District Court, after a non-jury trial, entered judgment for the employer; that judgment was affirmed by the Ninth Circuit on the ground that the Sheriff who terminated them had only a "vague awareness that matrons in general were demanding equal pay" and that the four matrons had presented no evidence that the Sheriff knew that they were the matrons who had sued the County.

e. *Nelson v. J.C. Penney Co.*, 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996), an age discrimination and retaliation case, involved, as did *Booker*, an employee with "an abrasive and intimidating management style" who, at age

55, was fired because of that style, while older managers remained on the job or were even promoted; a judgment in Nelson's favor was reversed by the Eighth Circuit on the ground that he had failed to produce any credible evidence to refute his employer's testimony that his firing was caused by his management style rather than his age or the fact that he had filed an age discrimination complaint, the court noting, *inter alia*, that there was "no evidence that Penney failed to discipline younger store managers with the same or similar difficulties."[4]

None of the cases which Metro-North described as similar to this one and in conflict with it is either similar or in conflict. The facts here show that Nelson learned that Padilla, previously deemed a star performer, had cooperated with the EEOC in an age discrimination case involving Barletta—a case in which Nelson knew that Padilla thought Metro-North to be in the wrong—and then demoted him for so-called "mismanagement" supposedly discovered after Padilla's cooperation with the EEOC. That a jury could rationally find that the "mismanagement" charge was a pretext is demonstrated by these words of the Second Circuit (A13):

> [A]lthough Badurina's budget analysis revealed that there were administrative problems at the OCC, when she previously had detected problems in the administrative practices of other units she first had met with managers of those units to attempt to resolve the problems. After discussing the problems at the OCC, however, Badurina did not allow Padilla an opportunity to provide a solution. Moreover, even though problems in the manpower control unit had cost Metro-North millions of dollars, no employees had been demoted in response. In contrast, even though the problems in the OCC had

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[4] The Eighth Circuit also noted, at 346, that Nelson had been given a "final warning about the status of his job before his supervisors knew of the age discrimination charge."

only cost Metro-North thousands of dollars, Padilla was demoted.

This case is not even remotely similar to those which Metro-North has cited for "conflict" purposes. The evidence of retaliation was clearly sufficient.

II. THE SECOND CIRCUIT NEITHER ANNOUNCED NOR APPLIED A *PER SE* STANDARD OF "WILLFULNESS"

Metro-North claims (Petition 20-22) that the Second Circuit announced and applied a *per se* standard of "willfulness" in affirming the jury's verdict on that issue.

Again, a mere reading of the Second Circuit's opinion on the "willfulness" issue (A 13-15) demonstrates that it *announced* no such standard.

The claim that the Second Circuit *applied* such a standard is likewise without merit. The Second Circuit simply held that by virtue of the facts of record, "the jury was entitled to find that Nelson's retaliatory conduct was willful" (A 14). The holding was based upon Nelson's own testimony that he knew that giving a statement to the EEOC is a "protected activity" under the law and that it is unlawful to retaliate against someone for engaging in a "protected activity." Aside from the ever-unlikely corporate confession of complete culpability—"We willfully violated the law"—it is difficult to imagine a more persuasive showing of willfulness than was made in this case.[5] The petition is therefore an invitation to rewrite the statute and eliminate the concept of willfulness—an invitation which this Court should decline.

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[5] Even if the claim had merit (which it does not) and the Second Circuit did, in fact, apply a *per se* standard in this case, Metro-North has conceded that that court generally follows the correct rule (Petition 21 n.5) and that the error occurred "only in this very case" (Petition 22). The correction of an isolated error, unlikely to recur, is not a traditional function of the writ.

The foundation of Metro-North's argument is that Nelson had already suspended Padilla for "mismanagement" by the time he learned about the latter's affidavit to the EEOC and that by demoting Padilla some weeks later Nelson had merely "followed through with a decision already in the making . . . . (Petition 22). Metro-North places great reliance upon "Nelson's persistent, and uncontroverted, denials . . . that he did not even know about Padilla's EEOC affidavit" until after May 9, i.e., after he had suspended him (Petition 21).

The foundation of Metro-North's argument has been built on quicksand. As the Second Circuit noted (A5): "Padilla testified that [on April 6, 1988—a month before his suspension] he told Nelson that he was scheduled for an EEOC interview concerning the charge by Barletta . . . ." Thus, as the Second Circuit held (A13), since Padilla had told Nelson the prior October that Barletta had been disqualified because of his age, "the jury could have found that Nelson knew of the content of Padilla's statement to the EEOC prior to suspending him." On this point, Metro-North asks this Court to grant certiorari upon factual allegations of a lack of evidence which are clearly refuted by both the record and the Second Circuit's accurate reading of that record.

III. THE SECOND CIRCUIT NEITHER RELIEVED PADILLA OF HIS DUTY TO MITIGATE DAMAGES NOR ERRED IN APPROVING A LIFETIME AWARD OF FRONT PAY

In order to clarify just how meritless Metro-North's position on the "mitigation" issue is, we set forth here some of the background facts.

When Padilla was illegally demoted, Metro-North "advised him to exercise his rights under the union contract covering dispatchers" (Petition 5). Padilla followed that advice and stayed at Metro-North in a lower-paying position. The District Court found no evidence that Padilla "would be able to find work commensurate with his skills at a salary equal to what

he received" at the position from which he was demoted (A34 n.4) and noted that any prospective employer would have been told by Metro-North that Padilla was an "incompetent" manager, since "mismanagement" was the ostensible reason for his demotion.[6] When he brought this action against Metro-North, Padilla did not seek an award of front pay; he sought reinstatement, the remedy which this Court has said is the preferable one. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 582 n.15 (1984). But, as the District Court noted, "leaving Metro-North would, no doubt, have reduced his chances of obtaining reinstatement as part of a final judgment."[7]

Against this factual backdrop, it can be seen that Metro-North's "mitigation" argument is actually this: Padilla was required to reject Nelson's "advice" that he accept a lower-paying position with Metro-North and had to seek employment elsewhere, despite the fact that he was unlikely to find a comparable position at comparable pay since, after all, he was a mere "mid-level manager with a high school education" whom Metro-North would describe as "incompetent" to any prospective employer. Moreover, Padilla would have to seek employment elsewhere even though leaving Metro-North would have reduced his chances of reinstatement once his rights were vindicated in a courtroom. Such a position does not merit the time of this Court.

Metro-North's claim (Petition 22-23) that the Second Circuit's decision is somehow in conflict with that of the Third Circuit in *Tubari v. NLRB*, 959 F.2d 451 (3d Cir. 1992), is not only erroneous but irrelevant. The claim is erroneous because

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[6] The statement is contained in a District Court opinion in this matter, not contained in the Appendix to the petition, but reported at 1995 WL 431324 at *1 (S.D.N.Y.). In its brief in the Second Circuit, at page 40, Metro-North saw fit to describe Padilla as a mere "mid level manager with a high school education"—hardly the description of a job seeker likely to set the managerial world on fire.

[7] See *id.* at *2 n.2.

the two cases involve significantly different facts: in *Tubari*, the employees were *terminated* but, instead of seeking comparable employment, almost immediately took low paying jobs with their own union picketing Tubari[8]. Here, Padilla accepted Metro-North's "advice" and remained employed by it. The claim is irrelevant because, as found by both courts below—consistent with other case law[9]—Padilla mitigated damages by remaining on the job at a position with lesser pay.

Finally, Metro-North asserts that there is an issue that this Court should resolve concerning the length of the front pay award—about twenty-three years. We note first that the issue is of Metro-North's own creation, since it refused to grant Padilla the reinstatement which was his (and the law's) preferred remedy. A show of adamancy on such an issue ought not merit this Court's review. Second, its argument that the purpose of front pay is to tide an employee over until comparable employment is found is valid enough in most cases, but the attempt to apply it here flies in the face of the fact that the District Court found that Padilla was unlikely to find such employment. The length of the front pay award is explained and justified by the undeniable fact that Metro-North chose to retaliate unlawfully against a relatively young man who cooperated with the EEOC, rather than one who did so on the verge of retirement. A defendant takes its plaintiff as it finds him.

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[8] In contrast to Padilla, whose employment skills were found to be unique, the workers in *Tubari* were unskilled, a fact upon which the Third Circuit relied when it stated, at 459, that "the very fact that the discriminatees were unskilled may have made it easier for them to find substantially equivalent employment."

[9] See, e.g.: *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273 (10th Cir. 1980), *cert. denied sub nom. Safeway Stores, Inc. v. Crespin*, 451 U.S. 986 (1981) ("[R]easonable diligence would not require claimant to have sought employment elsewhere. He remained in the employment of the defendant, secure in a long term position. Such conduct was prudent under the circumstances."); *Jurgens v. EEOC*, 903 F.2d 386, 389 (5th Cir. 1990) ("employee's duty to mitigate damages encompasses remaining on the job.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Date: May 16, 1997

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